

Valuable FCC Spectrum Licenses that Now Can be Sold -- With an Independent Appraisal

Introduction. In July 2019, the FCC upended the status quo of 57 years of educational institutions holding FCC licenses for some of the largest spectrum bands.¹ The band is 190 MHz of highly desirable 2.5 GHz spectrum. Starting in 1963, the FCC gave away these spectrum licenses to schools and public television stations for video and data use.² The FCC calls the spectrum Educational Broadcast Service or “EBS.” The 2019 FCC order dramatically increased the value of the EBS spectrum. First, it allowed commercial firms, like mobile operators, to acquire the spectrum. Second, it eliminated the requirement that institutions use the spectrum for educational purposes. Third, it removed term lease limitations. Notably, the FCC set a timetable for an “overlay” 2.5 GHz auction in early 2021 to auction the unused “white space” areas between the EBS 2.5 GHz licensed geographies.

The 2.5 GHz spectrum, called “mid-band” spectrum, is considered ideal for the new 5G mobile service. As an example of the potential value of the EBS spectrum, one analyst estimates that mobile operators may spend as much as \$50 billion for 280 MHz of similar 3.7-4.0 GHz mid-band spectrum in an auction scheduled for December 2020.³

Because the EBS 2.5 GHz spectrum is highly desired by mobile operators for 5G service and the licenses held by educational institutions may now be freely conveyed, as opposed to leased, to mobile operators, educational institutions have the

opportunity to monetize these valuable intangible assets. Depending on the amount of spectrum held and the population covered by the licenses, the spectrum licenses could be worth many millions of dollars each.

State law can require educational non-profits and schools to exercise their duty of care by obtaining independent appraisals or fairness opinions prior to selling valuable assets. In addition, boards of directors can be held accountable for failing to act on an informed basis and in good faith when conveying valuable assets without obtaining independent valuations or fairness opinions. Valuation firms specializing in appraising spectrum licenses can provide the non-profit EBS license holders with independent fair market valuations.

EBS Spectrum History. The EBS spectrum band ranges from 2502 MHz to 2690 MHz, making it one of the largest spectrum bands. The FCC created the band before the invention of cell phone service and the current incessant demand for mobile spectrum. The FCC allocated the spectrum for one-way video links among school buildings. With a radius of 35 miles, each license covers 3,848 square miles. Using an average population density of 94 people per square mile, this means that the average EBS license covers 360,000 people. The FCC typically awarded schools four EBS channels totaling 23.5 MHz and also provided five EBS channel groupings. Thus, in one license area there could be 112.5 MHz of spectrum covering a population of 360,000, or 405 million MHz-Pop.⁴

FCC Opens the Educational Band for Commercial Use.

In 1985, the FCC relaxed the 100% educational requirement, allowing 95% of the licensed spectrum to be used for non-educational purposes.⁵ Then, in 2004, the FCC recognized that the band was ideal for 3G mobile service. The FCC reconfigured the channels and bands, making it usable for 3G, and permitted leasing by mobile providers. Thereafter, mobile providers, like Sprint, began actively leasing EBS spectrum licenses with long-term leases. By 2020, of the 2,193 EBS licenses, 93% were leased to third parties like Sprint, now T-Mobile.

The 2019 FCC EBS Order again reconfigured the spectrum for 5G mobile service, creating three new blocks to be auctioned in 2021. These included two blocks with wide 49.5 MHz and 50.5 MHz channels and one smaller 17.5 MHz channel.⁶

Valuation opinions for public institutions.

Spectrum license valuations are complex appraisals of intangible assets with indefinite lives.⁷ There are many inputs to consider, such as prior FCC and international spectrum auctions and private and secondary market sales.

Governing boards obtain fairness opinions, or valuations, as presumptive evidence that they have met their fiduciary duty of care and negotiated a fair price for a sale. The Delaware Supreme Court held in the *Van Gorkom* case that the board failed to inform themselves because they did not obtain a fairness opinion before making their decision on the merger. The court held the board members were personally liable for monetary damages.⁸ It explained that without a fairness opinion the board could

not properly assess the fair value of the corporation.⁹ The board had a fiduciary duty to inform itself, through a fairness opinion, to validate that the price offered by the buyer was adequate. Thus, obtaining an independent valuation or fairness opinion lowers a board's risk of liability by providing evidence that the board exercised due care.

Because EBS spectrum licenses are highly valuable assets of educational institutions, state attorneys general or aggrieved parties may demand an independent valuation to ensure that the licenses are not sold for less than their fair market value.

Spectrum Valuation Methods. An independent valuation can demonstrate that the transaction price is fair and should deliver a range of high and low potential values. The opinion does not address the underlying business decision. There are three approaches for valuations: the Income, the Market, and the Asset Approach. Using a Discounted Cash Flow method, the Income Approach estimates projected future income from the spectrum discounted to its present value. The Market Approach examines comparable prices of spectrum sold in auctions or in private sales. The Asset Approach, or Balance Sheet Approach, uses book value or liquidation value. The Market Approach is the most common approach used for valuing spectrum.

A valuation must be thoroughly undergirded by facts. In *ACP Master v. Clearwire* (2017), Judge Lassiter of the Delaware Court of Chancery rejected an expert's valuation opinion concerning the sale of 2.5 GHz spectrum to Sprint because the valuation was based on "an extraordinary number of

assumptions.”¹⁰ One assumption converted a single, regional spectrum purchase into a national spectrum price. In another case, *Sunbelt Beverage*, the Delaware Court of Chancery rejected an expert’s valuation as “a mere afterthought, pure window dressing,” because the comparable companies selected were too dissimilar.¹¹

Several appraisal organizations have developed standards and guidance for valuing intangible assets, such as spectrum. They include the American Society of Appraisers and the American Institute of Certified Public Accountants. The standards include the Uniform Standards of Professional Appraisal Practice. Spectrum appraisals should follow these practices.

Conclusion. EBS licenses held by educational institutions are extremely valuable, intangible assets that are now in high demand by mobile operators.

Spectrum appraisal is a complex, specialized area of valuation. Board members of educational institutions should protect themselves against possible liability for failure to exercise due care by obtaining professional valuations before entering into negotiations to sell or lease EBS spectrum assets.

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¹ 2019 FCC EBS Order Transforming the 2.5 GHz Band, Report and Order, WT Docket No. 18-120, 34 FCC Rcd 5446 (2019) (“2019 EBS Order”)

² See, *Educational Television*, ... Regulations to Establish Educational Television Service ... on Channels in the .. 2500-2690 Mc/s Frequency Band, Report & Order, Docket No. 14744, 39 FCC 846 (1963), *recon. denied*, 39 FCC 873 (1964).

³ Kameron Leach, *C-Band Analyst Says Spectrum Sale May Net \$50 Billion in Revenue*, Bloomberg News (Jan. 6, 2020).

⁴ 22.5 MHz x 5 channel groups

⁵ *Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, Report and

Order, 13 FCC Rcd 19112, 19157 ¶¶ 86-87 (1998).

⁶ 2019 EBS Order, ¶ 96.

⁷ Financial Accounting Standards Board (FASB) Accounting Standards Codification (ASC) Topic 820.

⁸ *Smith v. Van Gorkom*, 488 A2d 858 (Del. 1985) (also known as *Transunion*).

⁹ *The Five Most Common Mistakes of Board Directors*, Adam Bryant (June 21, 2018) <https://www.forbes.com/sites/adambryant/2018/06/21/the-five-most-common-mistakes-of-board-directors/#46c406fe2500>.

¹⁰ *ACP Master v. Sprint*, C.A. No. 8508-VCL (Del. Ch. 2017).

¹¹ *In re Sunbelt Beverage Corp. Shareholder Litigation*, C.A. No. 16089-CC (Del. Ch. 2010).